

STATE OF MICHIGAN
COURT OF APPEALS

JOHN EVERTON,

Plaintiff-Appellant,

v

SUSAN WILLIAMS,

Defendant-Appellee,

and

BALLARD POWER SYSTEMS
CORPORATION,

Defendant.

FOR PUBLICATION

March 23, 2006

9:00 a.m.

No. 264554

Oakland Circuit Court

LC No. 2005-065624-CL

Official Reported Version

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

CAVANAGH, J.

Plaintiff appeals as of right the summary dismissal of his tortious interference claim against defendant Susan Williams, only, pursuant to MCR 2.116(C)(4).¹ We reverse.

Plaintiff was terminated from his employment with Ballard Power Systems Corporation following Williams's claim that plaintiff sexually harassed her at work. Plaintiff brought this action alleging, in part, that Williams tortiously interfered with his business expectancy of continued employment with Ballard by making false accusations about him. Following defendant's filing of a motion for summary disposition, the trial court held that plaintiff stated a valid cause of action against Williams, but held that the damages available to plaintiff were only nominal—usually \$1. The trial court concluded that it lacked subject-matter jurisdiction, therefore, and dismissed the case.

¹ Because plaintiff is only appealing the dismissal of count I of his complaint, which is his claim against Williams, we refer to Williams as "defendant."

On appeal, plaintiff argues that his potential recovery on this tortious interference claim is not limited to nominal damages as a matter of law. After review de novo of this question of law, we agree. See *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

In concluding that plaintiff was only entitled to a recovery of nominal damages, if any, the trial court relied on *Feaheny v Caldwell*, 175 Mich App 291; 437 NW2d 358 (1989), and *Sepanske v Bendix Corp*, 147 Mich App 819; 384 NW2d 54 (1985), for the proposition that, while a cause of action for tortious interference with an at-will employment contract can be maintained, the damages accruing after termination are limited to nominal damages because of the speculative nature of the claim.

However, as plaintiff argues on appeal, that law limiting recovery to nominal damages in actions involving at-will contracts was overruled by *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83; 706 NW2d 843 (2005) (*Health Call II*). Specifically, this Court held

that a blanket rule limiting recovery to nominal damages as a matter of law in all actions arising out of or related to the termination of at-will contracts is not legally sound, because there may exist factual scenarios in which there is a tangible basis on which future damages may be assessed that are not overly speculative despite the at-will nature of the underlying contract. [*Id.* at 85-86.]

Defendant argues, however, that the holding in *Health Call II* does not apply when the underlying contract is an at-will employment contract. But that position is not supported by a fair reading of the *Health Call II* case.

The *Health Call II* analysis began with a reference to *Feaheny*, a tortious interference case involving an at-will employment contract, which held that such claims are actionable because "'an at-will employee who enjoys the confidence of his or her employer has the right to expect that a third party will not wrongfully undermine the existing favorable relationship.'" *Health Call II*, *supra* at 92, quoting *Feaheny*, *supra* at 304. Then, the Court considered the issue of damages flowing from this actionable claim.

The *Health Call II* Court first turned to *Environair, Inc v Steelcase, Inc*, 190 Mich App 289; 475 NW2d 366 (1991), a case that involved an at-will sales agreement contract and that relied on *Sepanske*—a case involving an at-will employment contract—to conclude that when an at-will contract is at issue, there is no tangible basis from which to assess damages. *Health Call II*, *supra* at 93-94, citing *Environair*, *supra* at 293-294. The *Health Call II* Court next considered the general rule "that remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action." *Health Call II*, *supra* at 96. With respect to the law on damages, the Court further noted:

Damages, however, are not speculative simply because they cannot be ascertained with mathematical precision. Although the result may only be an approximation, it is sufficient if a reasonable basis for computation exists.

Moreover, the law will not demand that a plaintiff show a higher degree of certainty than the nature of the case permits. . . . Furthermore, the certainty requirement is relaxed where damages have been established but the amount of damages remains an open question. Questions regarding what damages may be reasonably anticipated are issues better left to the trier of fact. [*Id.* at 96-97 (citations omitted).]

Then the *Health Call II* Court opined that it "must construe *Environair* as standing for the proposition that damages arising out of or related to the termination of an at-will contract are speculative as a matter of law in all cases because there is no tangible basis on which damages can be assessed." *Id.* at 98. The Court noted that in *Health Call of Detroit v Atrium Home & Health Care Services, Inc.*, 265 Mich App 79; 695 NW2d 337 (2005) (*Health Call I*), vacated in part 265 Mich App 801 (2005), the *Health Call I* panel had held that, but for the holding in *Environair*, it would have "found that factual circumstances exist that could reasonably support an award by the trier of fact of future damages that are not overly speculative or uncertain" *Health Call II*, *supra* at 98, citing *Health Call I*, *supra* at 85-86. Thus, pursuant to MCR 7.215(J), a conflict arose, which the *Health Call II* panel defined as "whether it is appropriate to limit recovery to nominal damages as a matter of law in all cases in which the damages sought arose out of or are related to the termination of an at-will contract." *Health Call II*, *supra* at 100. The *Health Call II* Court answered in the negative,² concluding that

a blanket rule limiting recovery to nominal damages as a matter of law in all actions arising out of or related to the termination of at-will contracts is not legally sound, because there may exist factual scenarios in which there is a tangible basis on which future damages may be assessed that are not overly speculative despite the at-will nature of the underlying contract. [*Id.* at 85-86.]

We reject defendant's interpretation of the *Health Call II* holding as being limited to at-will contracts outside the employment setting. The analysis relies on cases involving at-will employment contracts, and the scope of the holding is clearly stated as including "*all actions* arising out of or related to the termination of at-will contracts," *id.* at 85-86, 106, 107 (emphasis added), and "*all cases* in which the damages sought arose out of or are related to the termination of an at-will contract," *id.* at 100 (emphasis added). The holding is not limited in application to cases in which the underlying at-will contract is not an employment contract—it applies to all cases involving the termination of an at-will contract, employment or otherwise. And we agree with that holding. There is no obvious reason to distinguish between types of at-will contracts, particularly with respect to the issue of damages arising out of or related to their termination, because the same difficulty in establishing damages is inherent in all these types of cases. We agree with the *Health Call II* Court that, albeit rare situations, "there may exist factual scenarios in which there is a tangible basis on which future damages may be assessed that are not overly speculative despite the at-will nature of the underlying contract." *Id.* at 86. In any event, in addressing the dissent's concern, the *Health Call II* Court indicated that its holding applied in the context of at-will employment contracts, when it noted the following:

² And, thus, overruled *Environair*.

If one subscribes to the dissent's view regarding future damages as always being speculative when they relate to at-will employment contracts, one wonders whether the dissent would reverse case law that allows for more than nominal future damages for at-will employees whose employment is terminated in violation of various civil rights statutes or, for that matter, future damages for a wrongful death claim involving an at-will employee. Future damages for lost wages have traditionally been allowed in situations in which there is no dispute of fact that the injured party was an at-will employee. Simply because damages cannot be ascertained with mathematical certainty does not make them unacceptably speculative. It is for this reason that what damages may reasonably be anticipated is an issue better left for the trier of fact. [*Id.* at 106-107.]

Accordingly, we reverse the trial court's determination that plaintiff's potential recovery on his tortious interference claim was limited, as a matter of law, to nominal damages. We express no opinion on whether, in this case, there exists a tangible basis on which to assess future damages that is not overly speculative.

Next, plaintiff argues that the trial court's dismissal for lack of subject-matter jurisdiction should be reversed. After review de novo to determine whether Williams was entitled to judgment as a matter of law, we agree. See MCR 2.116(C)(4); *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000). The trial court's decision to dismiss was based solely on its erroneous conclusion that plaintiff's potential recovery was limited to nominal damages as a matter of law; therefore, we reverse the dismissal and remand for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Alton T. Davis

/s/ Michael J. Talbot